

# IS “FINAL” REALLY FINAL?



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*Recently, the Appeal Committee of the Hong Kong Court of Final Appeal raised the question of whether that court had the power to hear an appeal against a decision of the Court of Appeal. The decision in question concerned a judgment of professional misconduct against an accountant by a disciplinary committee under the Professional Accountants Ordinance. The ordinance clearly states that the decision of the Court of Appeal is final. This article examines whether the Court of Final Appeal has the constitutional jurisdiction to hear appeals against Court of Appeal decisions. The author concludes that for appeals that are statutory in nature, if the relevant statute specifically excludes appeals to the Court of Final Appeal then that court has no jurisdiction to hear any such appeal.*

## Introduction

In *Peter Chan v Hong Kong Society of Accountants*<sup>1</sup> the Appeal Committee of the CFA asked rhetorically, “Is ‘final’ really final?” The case involved an accountant facing a complaint that he had been negligent in the conduct of his profession under the Professional Accountants Ordinance (PAO).<sup>2</sup> A disciplinary committee found the complaint proven and the accountant was reprimanded and ordered to pay a penalty to the Hong Kong Society of Accountants. The accountant appealed to the Court of Appeal, but the appeal was dismissed. He then sought the Court of Appeal’s leave to appeal to the CFA. Based on section 41(2) of the PAO, which provides that “the decision of the Court of Appeal upon such appeal shall be final”, the leave was refused. The accountant then applied to the CFA for leave to appeal and it was in this context that the Appeal Committee asked whether final really was final.

The Appeal Committee seemed to be of the view that the CFA had the jurisdiction to hear the appeal, although the committee preferred to leave the question unanswered due to the lack of a full legal argument before it.<sup>3</sup> The committee questioned whether the Court of Appeal could prevent the

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<sup>1</sup> FAMV No 11 of 2001.

<sup>2</sup> Section 34(1)(a)(iv), Cap 50.

<sup>3</sup> The Appeal Committee made a similar assumption in an earlier case, *A Solicitor v Law Society of Hong Kong*, FAMV No 20 of 2000.

CFA from correcting errors of law on points of great general or public importance. It proceeded on the basis that the CFA had the jurisdiction, but refused leave because the accountant failed to show any reasonable prospect of success.

In the case, the Court of Appeal did not cite any authority to support its decision. The Appeal Committee surmised that the decision probably relied on the Privy Council decision in *De Morgan v Director of Social Welfare*,<sup>4</sup> but raised doubts about the reasoning of that decision. In that case, the Privy Council ruled on an appeal against a decision of the New Zealand Court of Appeal. It decided that on the true construction of a statute which provided that "the decision of the Court of Appeal shall be final", the only possible intent of the words was to exclude the remaining right of appeal. The Privy Council indicated that as the power of the New Zealand legislature to pass legislation containing such provisions was not challenged, the statute would effectively exclude any appeal to a court of final appeal.

The Privy Council decision provided that the CFA might have jurisdiction to hear the appeal by challenging the authority of the legislature to make such a statutory provision. If the statute was unconstitutional then the CFA would have jurisdiction. However, the Appeal Committee of the CFA noted that the Privy Council did not mention how the power of the legislature to pass such legislation could be challenged.

### Constitutional Provisions of the Basic Law

The constitutional question was not addressed in *De Morgan*. Moreover, the constitutional setting of New Zealand is totally different from that of Hong Kong.<sup>5</sup> Hence, the ruling has no reference value and the situation in *Peter Chan v Hong Kong Society of Accountants* must be examined with regard to Hong Kong's specific constitutional setting.

The Basic Law is the constitution of the HKSAR. Article 11 of the Basic Law provides that no law which is enacted by the legislature of the HKSAR shall contravene the Basic Law. If any legislation does contravene the Basic Law then that legislation will be invalidated. However, in terms of constitutional challenge under the Basic Law, the question whether the Basic Law

<sup>4</sup> [1998] AC 275. Two petitioners sought special leave of the Privy Council to appeal to the Judicial Committee against decisions of the New Zealand Court of Appeal. The relevant legislation provided that the decision of the Court of Appeal was "final".

<sup>5</sup> The power to give special leave to appeal was a prerogative power and required express words to be limited or abolished. However, this power is no longer a normal prerogative power of the Crown since the passage of the Judicial Committee Acts 1833 and 1844, and the Statute of Westminster 1931 and its adoption in New Zealand by the Statute of Westminster Adoption Act 1947. It is now enough for the limitation or abolition to be shown by either express words or necessary intendment.

grants the CFA the jurisdiction to hear all appeals against the decisions of the Court of Appeal, even when a statute expressly states that a particular decision is final, must be examined. If the CFA's jurisdiction can be established in this way, then the statute is overruled by the constitutional provision that grants jurisdiction to the CFA. Therefore, the provisions of the Basic Law must be examined to ascertain whether any provision explicitly or implicitly grants the CFA the jurisdiction to hear appeals against every decision of the Court of Appeal.

The first is Article 19 of the Basic Law which provides that HKSAR courts have jurisdiction over all cases in the HKSAR with the exception of the restrictions which are imposed on that jurisdiction by the legal system and the maintenance of principles that were previously in force in Hong Kong.<sup>6</sup> Hence, Article 19 does not specify which court must exercise jurisdiction over a particular case in the first instance, which court must hear subsequent appeals or how many appeals are allowed. What Article 19 determines is that if a case reaches the CFA, the CFA will have the authority to hear it. This is because it is safe to assume that if a lower court has jurisdiction over a case according to the Basic Law, the CFA, as the highest court in the HKSAR, must also have jurisdiction over that case. However, it does not clearly indicate that the CFA has the authority to hear all cases.

Article 84 of the Basic Law further provides that HKSAR courts shall adjudicate cases in accordance with the laws that are applicable in the HKSAR and can refer to precedents of other common law jurisdictions. The laws that are applicable in the HKSAR include the Basic Law, the common law and ordinances that are enacted by the Legislative Council.<sup>7</sup> Are there other provisions of the Basic Law, the common law or any ordinances that support the jurisdiction of the CFA to hear all appeals?

Articles 2 and 19 of the Basic Law provide that the HKSAR enjoys the power of final adjudication.<sup>8</sup> Article 82 of the Basic Law provides that this power is vested in the CFA. Hence, the legal basis of the CFA jurisdiction to hear appeals is not derived from common law, but from the Basic Law. The question is whether the vesting of the power of final adjudication to the CFA actually grants it the power to hear every appeal.

<sup>6</sup> For detailed discussion of the courts of the HKSAR, see Benny Tai, "The Jurisdiction of the Courts of the Hong Kong Special Administrative Region," in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal Ltd, 1998), p 65.

<sup>7</sup> Under Art 18 of the Basic Law, the laws that are applicable in the HKSAR include the Basic Law, the laws previously in force in Hong Kong as provided for in Art 8 of the Basic Law, and the laws enacted by the legislature of the HKSAR. Under Art 8, common law, rules of equity, ordinances, subordinate legislation and customary law that does not contravene the Basic Law are laws that were previously in force in Hong Kong.

<sup>8</sup> Arts 2 and 19 of the Basic Law of the HKSAR.

In *Peter Chan v Hong Kong Society of Accountants*, it seemed to be the view of the Appeal Committee of the CFA that the CFA had the power to correct errors of law on points of great general or public importance. However, the basis on which the Appeal Committee made this claim is not clear. One possibility is the constitutional provision that vests the power of final adjudication in the CFA. However, the Appeal Committee would have needed to read much into the provision to support such an interpretation. The Basic Law merely states that the HKSAR enjoys the power of final adjudication and that the CFA will exercise that power on behalf of the HKSAR. The CFA does not derive powers for itself from this provision. To claim that the CFA has the power to hear all appeals on the basis of its power of final adjudication expands the provision from merely regulating the relationship between the systems in the HKSAR and mainland China to regulating the relationship between two internal organs of the HKSAR: the CFA and the Legislative Council. The context of granting the HKSAR the power of final adjudication is meant to reflect the high degree of autonomy that is enjoyed by Hong Kong in that local appeals do not go to the courts in mainland China. Unless further support can be found from the statutory context or common law, any other interpretation does not have a firm foundation.

### Statutory Provisions

If the provisions of the Basic Law by themselves cannot provide authority to the CFA to hear appeals of all cases, then whether any provision in an ordinance can provide such authority directly, or at least provide a context in which the constitutional provision can be interpreted, must be considered. Such a provision will only be valid when there is no contradiction between it and the Basic Law. As illustrated above, the constitutional provisions seem to be silent on whether the CFA has the authority to hear appeals in all cases. The jurisdiction of the CFA and the power to hear appeals are provided in the Hong Kong Court of Final Appeal Ordinance (HKCFAO).<sup>9</sup> Section 4 of the HKCFAO provides that the CFA has the jurisdiction to hear appeals conferred on it under the HKCFAO and by any other law. A party can apply to the Court of Appeal or the CFA for leave to appeal to the CFA.<sup>10</sup> Under the HKCFAO, criminal causes or matters are appealable to the CFA at its discretion from any final decision of the Court of Appeal.<sup>11</sup> In any civil cause or matter, certain appeals to the CFA are

<sup>9</sup> Cap 484.

<sup>10</sup> Sections 23 and 24, Cap 484.

<sup>11</sup> Section 32, Cap 484. Appeals to the CFA can also be heard at its discretion from any final decision of the Court of First Instance (not being a verdict or finding of a jury) from which no appeal lies to the Court of Appeal.

appealable to the CFA as of right.<sup>12</sup> Section 22(1)(b) of the HKCFAO provides that:

“An appeal shall lie to the Court [the CFA] in any civil cause or matter ... at the discretion of the Court of Appeal or the Court from any other judgment of the Court of Appeal in any civil cause or matter, whether final or interlocutory, if, in the opinion of the Court of Appeal or the Court, as the case may be, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision ...”<sup>13</sup>

It seems that this provision may give the CFA the power to hear all appeals against decisions of the Court of Appeal in civil cases. In civil causes or matters, the CFA can decide by itself whether the question which was considered in the judgment of the Court of Appeal is of great general or public importance and hence should be submitted to the CFA for decision. The CFA can then use this discretionary power to decide that an error of law which was committed by the Court of Appeal is on a point of great general or public importance, and that it has the jurisdiction to hear the appeal even when the relevant statute states that the decision of the Court of Appeal is final. However, the provision is not a constitutional provision and cannot affect subsequent legislation. Indeed, the PAO<sup>14</sup> was enacted before the HKCFAO,<sup>15</sup> and it is arguable that section 41(2) of the PAO was overruled by section 22(1)(b) of the HKCFAO at the time of its enactment. However, this is not the only possible interpretation of section 22(1)(b).

If the wider statutory context is considered, then the meaning of section 22(1)(b) may not necessarily be that plain. The PAO is an ordinance that provides for the registration and control of the accounting profession. The ordinance has provisions to maintain professional standards and allows complaints of professional misconduct against accountants.<sup>16</sup> There are other ordinances that govern the registration and control of other professions, all of which include provisions to maintain professional standards that allow

<sup>12</sup> Section 22(1)(a), Cap 484. When the matter in dispute on the appeal of the final judgment of the Court of Appeal in any civil cause or matter amounts to the value of \$1,000,000 or more, or when the appeal involves, directly or indirectly, a claim with respect to property or a civil right amounting to the value of \$1,000,000 or more, a party may as of right appeal to the CFA.

<sup>13</sup> Moreover, the CFA can allow an appeal against a decision of the Court of First Instance made under or related to the Chief Executive Election Ordinance (Cap 569). (See also s 22(1)(c), Cap 484.)

<sup>14</sup> The PAO was enacted in 1973.

<sup>15</sup> The HKCFAO was enacted in 1995 and came into effect on 1 July 1997. Minor amendments to s 22 were made in 2001.

<sup>16</sup> Part V of the PAO. The case in question was an appeal against the decision of the Court of Appeal concerning the appeal against a decision of the disciplinary committee that was made under the provisions of the PAO.

complaints against professional misconduct. Some of these ordinances, like the PAO, were enacted before the HKCFAO,<sup>17</sup> but others were enacted after the HKCFAO.<sup>18</sup> These ordinances use similar schemes to deal with disciplinary matters in the professions. A disciplinary body is responsible for hearing complaints against members of the profession, and any member of the profession who is complained against has a right to appeal against the ruling of the disciplinary body. In some of the ordinances, appeals against the decisions of the disciplinary bodies must go to the Court of Appeal.<sup>19</sup> In other ordinances, appeals must go to the Court of First Instance,<sup>20</sup> and still others to a tribunal that has been established under the statute.<sup>21</sup> In all of these instances, regardless of whether the appellate body is the Court of Appeal, the Court of First Instance or a tribunal, the decision of the appellate body is stipulated as final.

If the meaning of section 22(1)(b) of the HKCFA is interpreted to give the CFA the power to override section 41(2) of the PAO, then two absurd results would be created. Firstly, if the interpretation is correct, then the CFA can hear appeals against Court of Appeal decisions in relation to the rulings of the disciplinary bodies of some, but not all, professional organisations. This would depend on whether the statute that covers the registration of the members of the professional body was enacted before or after 1 July 1997, the date of the enactment of the HKCFAO. Secondly, the CFA would have no jurisdiction to hear such appeals should the appeal against the ruling of the disciplinary body of a professional organisation have been heard by the Court of First Instance or a tribunal that was established under that statute to hear appeals. A lower court, or even a tribunal, could be exempted from the appellate jurisdiction of the CFA, but the Court of Appeal would not.

There is no rational ground on which to justify such distinctions in the CFA's jurisdiction over rulings made by professional bodies, all of which use comparable schemes to deal with disciplinary matters and appeals. As there is no such express wording in the HKCFAO, it is inconsistent with the wider

<sup>17</sup> The Medical Registration Ordinance (Cap 161) was enacted in 1957; the Legal Practitioners Ordinance (Cap 159) was enacted in 1964; the Pharmacy and Poisons Ordinance (Cap 138) was enacted in 1970; the Pilotage Ordinance (Cap 84) was enacted in 1971; the Engineers Registration Ordinance (Cap 409) was enacted in 1990; the Travel Agents Ordinance (Cap 218) was enacted in 1985; the Social Workers Registration Ordinance (Cap 505) was enacted on 6 June 1997, only days before the HKCFAO came into force.

<sup>18</sup> The Estate Agents Ordinance (Cap 511) was enacted in 1998; the Chinese Medicine Ordinance (Cap 549) was enacted in 1999; the Housing Managers Registration Ordinance (Cap 550) was enacted in 1999.

<sup>19</sup> Section 26, the Medical Registration Ordinance (Cap 161); s 13 and s 37B, the Legal Practitioners Ordinance (Cap 159); s 28, the Engineers Registration Ordinance (Cap 409); s 33, the Social Workers Registration Ordinance (Cap 505); s 28, the Housing Managers Registration Ordinance (Cap 550) and s 103, the Chinese Medicine Ordinance (Cap 549).

<sup>20</sup> Section 20, the Pilotage Ordinance (Cap 84); s 16, the Pharmacy and Poisons Ordinance (Cap 138).

<sup>21</sup> Section 30, the Travel Agents Ordinance (Cap 218); s 32, the Estate Agents Ordinance (Cap 511).

statutory context to override the power of the Court of Appeal to make conclusive decisions on appeals against the rulings of the disciplinary bodies in these statutes, including the PAO.

Another issue is that the CFA only has the power to hear all appeals against judgments of the Court of Appeal in cases of civil cause or matter. There is serious doubt as to whether the judgment made by the Court of Appeal in hearing appeals against the ruling of a disciplinary committee under the PAO is a judgment in a civil cause or matter. The civil jurisdiction<sup>22</sup> of the courts cover actions *in personam* and actions *in rem*. Actions *in personam* are *inter partes* actions concerning the settlement of the rights of the parties between themselves. An example is an action for damages for breach of contract or in a tort case. Actions *in rem* are actions brought to vindicate a right, such as ownership, that is available against all persons.<sup>23</sup> The nature of a disciplinary hearing under a statute that regulates a professional body does not fall under either of the heads of the civil jurisdiction of HKSAR courts. The disciplinary hearing is based in statute.<sup>24</sup> If there is any appeal against a disciplinary ruling, then it can also only be based in statute. There is no right to appeal under common law.<sup>25</sup> If the statute on which the disciplinary hearing is based states that the decision of the Court of Appeal is final, then there is no other legal basis for the CFA to override the statutory provision. Appeals from disciplinary hearings are simply not “appeals in civil cause or matter”.

On the basis of this analysis, section 41(2) of the HKCFAO neither provides the direct legal authority for, nor a context for interpretation of, the constitutional provisions for the CFA to hear appeals in all cases. As already mentioned, the wider statutory context points to the same conclusion.

### Common Law

If the statute cannot provide the authority or context then the question is whether the common law can provide such authority must be considered. As illustrated above, there is no right to appeal in disciplinary hearings in the common law. The courts do enjoy inherent jurisdiction over cases and it is already well accepted that they have the inherent power to correct any error of law, jurisdictional error or not, that is committed by administrative bodies

<sup>22</sup> The civil jurisdiction of the courts of the HKSAR can be divided into the private law jurisdiction and public law jurisdiction. The private law jurisdiction is mentioned here. The public law jurisdiction to review administrative actions and decisions is described in the following part on “common law”.

<sup>23</sup> For a full explanation, see Tai (n 6 above), pp 78–80.

<sup>24</sup> Brian Harris, *The Law and Practice of Disciplinary and Regulatory Proceedings* (Chichester, England: Barry Rose Law Publishers Ltd, 2nd edn, 1999), pp 1–4.

<sup>25</sup> *Ibid.*, p 322.

in the form of review.<sup>26</sup> However, the courts are not amenable to reviewing errors of law that are committed by other courts in making decisions under statutes that do not go to jurisdiction.<sup>27</sup> The common law rule in this area does not help our case very much. Firstly, it is concerned with the review of administrative decisions but not with appeals against administrative decisions. The basis of the inherent jurisdiction of a court is to review an error of law to allow it to enforce the law. This is very different from the power to hear appeals, which is about the merits and not the *vires* of the case. Secondly, even in review, the common law rule does not challenge a statutory provision which expressly states that a decision of an inferior court is final. Inferior courts are recognised as having the power to conclusively decide a point of law when it is on an issue within their jurisdictions. This is even more difficult in a case of appeal, especially when the court's jurisdiction is based on statute.

The other source of inherent jurisdiction can be that claimed by the CFA in *Ng Ka Ling v Director of Immigration (No 2)*.<sup>28</sup> In that case, the CFA added further explanation to a judgment that it had previously given explaining the basis of its inherent jurisdiction. It neither quoted an authority nor the constitutional framework to support its power to issue the explanation after its decision. The CFA admitted that clarifying its judgment on an application by one of the parties of the original judgment was exceptional, but justified this action by claiming that the nature of the matter was of great constitutional, public and general importance and that the original judgment had given rise to much controversy. Even then the CFA faced serious criticism that it had claimed inherent jurisdiction without explanation or authority.<sup>29</sup>

Even if the inherent jurisdiction in *Ng Ka Ling v Director of Immigration (No 2)* can be justified, the nature of the jurisdiction in this case is very different. The concern of *Ng Ka Ling v Director of Immigration (No 2)* was the finality of judgment, but the concern in this case is how an error of law of a lower court can be corrected. Moreover, the earlier case involved no great constitutional, public or general importance. The scope and limit of such inherent jurisdiction and the extent to which it can accommodate the power to correct errors of law that are committed by courts in the form of appeal is not clear. Unless we take the extreme view that the CFA enjoys unfettered jurisdiction to decide whatever matters it considers desirable, its claim of inherent jurisdiction is not justifiable. Therefore, the common law rule on the

<sup>26</sup> Wade and Forsyth, *Administrative Law* (Oxford: Oxford University Press, 8th edn, 2000), pp 33–34. See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

<sup>27</sup> *R v Hull University Visitors ex parte Page* [1993] AC 682.

<sup>28</sup> [1999] 1 HKLRD 577.

<sup>29</sup> Johannes M. M. Chan, "What the Court of Appeal has not Clarified in its Clarification: Jurisdiction and Amicus Intervention," in Chan, Fu and Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong: Hong Kong University Press, 2000).



inherent jurisdiction of the courts of the HKSAR, like the statutes, cannot by itself grant the CFA the power to hear appeals in all cases, nor can it provide a context to interpret the provision of the Basic Law to grant such a power to the CFA.

### **Conclusion**

Though the Appeal Committee of the CFA suggested that the CFA had the jurisdiction to hear all appeals against the decisions of the Court of Appeal on the ground that it had the power to correct any error of law on points of great general or public importance, this is not supported by the Basic Law, the HKCFAO or the common law. The decision of the Court of Appeal must be taken as final, as stated by the statute. In this sense, therefore, “final” is indeed final.

